STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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August 14, 1996

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M. Street, NW
Washington, DC 20554

Re: In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;

and

Regulatory Treatment of LEC Provision of Interexchange Service Originating in the LEC's Exchange Area

Dear Secretary Caton:

Enclosed are an original and eleven copies of the initial comments of the New York State Department of Public Service in the above-referenced proceeding.

Respectfully submitted,

Mary E Burgess

Mary E. Burgess
Assistant Counsel

Enclosure
MEB:avy:cc96-149.ltr

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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COMMENTS OF THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE

INTRODUCTION AND SUMMARY

The New York State Department of Public Service (NYDPS) hereby submits its comments in response to the Federal Communications Commission's (Commission) Notice of Proposed Rulemaking (Notice) regarding implementation of the non-accounting safeguards of Sections 271 and 272 of the Telecommunications Act of 1996 (the Act).

As a policy matter, NYDPS generally supports the safeguards proposed in the Notice as applied to interstate interLATA services. We agree that subscribers and competitors should be protected from the consequences of potential cost allocation abuses and discriminatory practices. The Commission seeks to achieve these goals through a combination of structural separation requirements, non-discrimination safeguards and

classification of carriers as dominant or non-dominant. However, as a legal matter, the NYDPS opposes the FCC's attempt in this Notice to exert authority over the provision of intrastate interLATA services.

I. SCOPE OF THE COMMISSION'S AUTHORITY

In the Notice, the Commission observes that Sections 271 and 272 address BOC provision of interLATA services and information services, and that because many states contain more than one LATA, interLATA traffic can be either intrastate or interstate in nature (para. 20). The Commission concludes that Sections 271 and 272 apply to all interLATA services (para. 23). NYDPS agrees. The Commission also tentatively concludes that any rules it promulgates pursuant to Sections 271 and 272 will apply to both intrastate and interstate services (para. 21). For the reasons that follow, NYDPS disagrees.

A. The Tentative Conclusion that the Commission's Role Under §§271 and 272 Supersedes State Authority Under these Sections is Incorrect

In the Notice, the Commission explains that when the Modified Final Judgment (MFJ) was in effect, its terms applied to the BOCs' provision of both intrastate and interstate service (para. 21). NYDPS agrees that Sections 271 and 272 of the Act were intended to replace the MFJ as to RBOC entry into both the interstate and intrastate interLATA market (Id.). However, the

proposal to preempt state non-accounting rules goes far beyond the intent of Congress.

Regarding the relationship of federal/state jurisdiction to the MFJ, the Decree did in fact limit both state and Commission authority over Regional Bell Operating Company entry into the interLATA market. It did not, however, limit state authority over intrastate interLATA telecommunications. The states have a long history of overseeing the intrastate operations of companies that were not prohibited, under the MFJ, from providing these services. The dual state/federal regulatory system that applied to intrastate and interstate services has a long tradition, beginning much earlier than the MFJ. Intrastate activities fell within the purview of state regulation by virtue of Section 152(b) of the Communications Act of 1934. In enacting the 1996 Communications Act, Congress did not see fit to eliminate state authority over intrastate communications, except in limited instances.

The Commission concludes that because Congress enacted Sections 271 and 272 after Section 152(b), Congress intended Sections 271 and 272 to take precedence over any contrary implications in 152(b) (para. 26). To support its conclusion, the Commission notes that in the Act, "there are instances where Congress indisputably gave the Commission intrastate jurisdiction without amending Section 2(b)" (Id.). Although this is a true

statement, the fact that Congress deemed it necessary to identify specific areas in which it was conferring authority over intrastate matters to the Commission (e.g., intrastate payphone service provider compensation in Section 276(b)) indicates Congress' recognition of the continued effect of 152(b). Thus, in the absence of an express indication of the contrary, §152(b) continues to "fence[] off from FCC reach or regulation intrastate matters" Louisiana Public Service Commission v. FCC, 476 U.S. 355, 370 (1985).

In addition, §601(c)(1) of the Act reflects Congress' intent to identify the parameters of the Commission's reach by providing that:

> This Act and the Amendments made by this Act shall not be construed to modify, impair, or supersede federal, state, or local law unless expressly so provided in such Act or amendments.

Thus, absent an express directive to establish rules applicable to intrastate interLATA services, the Commission lacks the authority to do so.

Finally, the Notice seems to suggest that because Sections 251 and 252 (which establish criteria for competitive entry into the local exchange market) of the Act apply to both interstate and intrastate aspects of interconnection, and since the safeguards called for §§271 and 272 constitute part of the process for competitive entry into the interLATA marketplace, and

since they were enacted simultaneously, then it follows that §§271 and 272 also apply to all interLATA services (para. 23). The fact that all of these sections are associated with a competitor's entry into the interLATA marketplace does not confer jurisdiction on the Commission over services that are intrastate in nature, unless the Act explicitly so states. The plain language of Section 271 is silent on the jurisdictional division of responsibilities. Therefore, Sections 601 and 152(b) apply.

B. The Issue of Whether State Commissions' Non-Structural Safeguards (Or Lack Thereof) Are Inconsistent with Commission Regulation is Premature, at Best

To support its proposed preemption of state authority to promulgate non-accounting safeguards applicable to intrastate interLATA services pursuant to §§271 and 272, the Commission states that "it is conceivable that a state may try to impose separate affiliate or nondiscrimination requirements on the intrastate portion of jurisdictionally mixed services that are inconsistent with the requirements of Section 272" (para. 29), and invites comment on this analysis. However, until a state actually imposes non-structural safeguards on the RBOC provision of jurisdictionally mixed services, it cannot be determined whether such safeguards are inconsistent with the provisions of the Act. The Commission tentatively concludes that "California III may provide support for Commission preemption of

... state regulations, to the extent that the regulations would thwart or impede the Commission's exercise of its authority ..." However, the court in California III determined that "'[t]he FCC has the burden ... of showing with some specificity that [state regulation] ... would negate the federal policy ....'"[1] The Commission has failed to meet this burden in the instant proceeding. Thus, the Commission's speculation regarding inconsistent state regulation is premature. Moreover, the Commission's conclusion that this Act superseded §152(b) is at odds with Section 601, which explicitly states that the Act "shall not be construed to modify, impair, or supersede...[s]tate...law unless expressly so provided...."

II. ACTIVITIES SUBJECT TO SECTION 272 REQUIREMENTS

The Notice addresses potential mergers among the BOCs, and asks how such mergers might affect the interpretation and application of Sections 271 and 272 (para. 40). NYDPS agrees with the Commission's conclusion that pursuant to §153(4)(B), the in-region states of a merged entity shall include all of the in-region states of each of the BOCs involved in the merger (Id.).

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[1] People of State of California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990) citing National Association of Regulatory Commissioners v. FCC, 880 F.2d 422, 430(D.C. Cir. 1989).

It appears that there would be no difference in the motivations of the pre- and post-merger corporations to discriminate against competitors and to engage in self-dealing. NYDPS recommends, therefore, that to the greatest extent possible, safeguards that exist in the post-merger organization be equally applicable during the pendency of the merger. NYDPS recommends that any transactions between a BOC and a potential merger affiliate be conducted at "arms-length" and that documentation of such a transaction be publicly available in writing. We would expect the same rules to apply to any joint venture activities involving two or more BOCs.

III. CLASSIFICATION OF LECs AND THEIR AFFILIATES AS DOMINANT OR NON-DOMINANT CARRIERS

The Notice seeks comment on what effect the merger of several BOCs should have on the determination to classify an interLATA affiliate as dominant or non-dominant (para. 148). NYDPS believes that the basic underlying market tests proposed by the Commission are sound, and that in the case of merger, the relevant "in-region" market area of a BOC that is being evaluated would have to be expanded to incorporate all states of the merged entity.

CONCLUSION

The NYDPS supports the Commission in its efforts to promulgate regulations that provide the non-accounting safeguards

called for in Section 271 and 272 of the Act governing the provision of interstate interLATA services. However, for all of the reasons enumerated above, safeguards governing the provision of intrastate interLATA service should be developed by the states, not the Commission.

Respectfully submitted,

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Dated: August 14, 1996

CC Docket No. 96-149

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Comments of New York State
Department of Public Service

CERTIFICATE OF SERVICE

I, Mary E. Burgess, hereby certify that an original and eleven copies of initial comments in the above-captioned proceeding were sent via Airborne Express to Mr. Caton, and by first class United State mail, postage paid, to all parties on the attached service list.

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